No. 329

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

THE UNTED STATES OF AMERICA, Petitioner

vs.

JOHN J. GILES

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The opening assumption in the argument for the Government that the decision in the instant case is "in direct conflict with" the decisions of other Courts, can proceed only, we respectfully suggest, from a misapprehension of those decisions in respect both to the facts they deal with and the principles they announce; while the concluding argument, contained in the doubtful assertion the decision creates "a large loophole—in the criminal statute" certainly affords no reason for the writ even if correct. The mind of the prosecutor will find expression in such argument;

but the answer is the time-honored one that our courts may not "insert a clause in the statute which Congress omitted"; or, (in the language of Mr. Justice Blatchford for this court) that

> "—before a man can be punished his case must be plainly and unquestionably within the statute." (U. S. v. Brewer, 139 U. S. 278); and (with Mr. Chief Justice Marshall) that "—it would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated". (U. S. vs. Wiltberger, 5 Wheat. 76, 96).

The utter fallacy of the government's contention may be exposed in this simple example: That statute, imposing by its plain language a penalty on him "who makes any false entry" would, under this contention, make every employee or agent guilty of *making a false entry* who, in the course of the day—at least after the last preceding count of the cash—might embezzle or steal one dollar, or ten dollars, or other sum, of the bank's money; for this would, of neccessity, *result* in false entry by his "criminal agent", the innocent and unknown bookkeeper, of the amount of cash on hand. That such obviously unintended absurdity would result from the construction contended for cannot be doubted. The reason the contention is fallacious is that it would punish, *not* the thing made punishable by the statute, (the *making* of the false entry), but the doing of, or omission to do, an act which may *conduce* to, or *result* in, not the entry itself, but the falsity of an entry to be later made independently by another with whom, and with whose entry, the actor, as in this case Giles, had no con-

nection. Giles here had no part in, nor connection with, nor control of, the making of the entry, nor no duty to make it or to see that it was made. Whatever duty he owed was to his employer, not to the bookkeeper. The most that can be said of him is his act would *contribute to the falsity* of the entry when, and if, it should be later made by the bookkeeper. By exactly the same token, and exactly in the same degree, the bank porter who might purloin a dollar from the desk, or drawer, or locker, would contribute to the falsity of the entry as to the cash on hand, when and if the bookkeeper should make that entry. Indeed, the porter's case would present a stronger one, for, we apprehend, the bank's bookkeeper would, as a matter of course, at the end of the day, make entry of the amount of cash on hand as that changes each day; while no entry would, we apprehend, be made in the account of a customer in the individual ledger unless the previous entry were reduced or augmented by withdrawal or deposit in that account. It will not be doubted we are correct in saying it is the *making* of the entry,—the *entry* itself—and not the doing of some act, however wrongful, which may *result* in the entry being false as made by some other independent person making it, in the course of events, which the statute denounces. This is said on authority of the plain words of the statute, and of this Court in the Cochran case, 157 U. S. 287, 293-4, where it is said "the penalty imposed—is affixed to the *one who makes*—is affixed to the *making* of the false entry",—not to some other, or to some other's independent precedent act, however wrongful, which may, in the course of events, or by circumstance, *lead to*, or *result in*, the *falsity* of the entry. That this is true, and that the act of Giles was a distinct and wholly different act, remote from the making of the entry, and connected with it only by

subsequent circumstance and remote act performed independently by another over whom he had no authority, cannot be gainsaid. That being so, then, in order to hold Giles guilty of the *making* of the entry (which is all the statute denounces) we must impute to him the independent act, subsequently performed, of another, whom he had not employed, controlled, directed, nor spoken or written to, and at whose performance Giles was not present, and who would have made his entry whether Giles' withholding the deposit slips had contributed to its falsity or not, and even if Giles had not received the deposits.

The contention can but illustrate how far afield we wander in the realm of loose construction instead of confining ourselves within accepted bounds of *strict* construction (as this Court has so often said we must), when we attempt to "include by construction" an act supposed to be "within the mischief" but not "clearly within the letter", of the penal statute.

What the accused did is not covered by, and does not render him punishable under, the statute:

12 U. S. C. A., Sec. 592 p. 427;
U. S. v. McClarty, 191 Fed. 523;
U. S. v. McClarty, 191 Fed. 518;
U. S. v. Herrig, 204 Fed. 124;
U. S. v. Booker, 98 Fed. 291;
Twining v. U. S. 141 Fed. 41;
State v. Davidson (Dak.) 180 N. W. 31;
State v. Asol (Mont.) 256 Pac. 1071, 1081;
U. S. v. Eqe, 49 Fed. 852, 853;
Peightel v. U. S., 49 Fed. (2) 230, 237;
Cochran v. U. S., 157 U. S. 287;
Richardson v. U. S., 181 Fed. 1;

7 C. J. 801, Sec. 696;
21 A. & E. Encyc. Law, 366.

That the statute is to be strictly construed, and the act of accused unmistakably within its plain words; that it may not be extended by construction; and that all reasonable doubt of its meaning must be resolved in favor of accused, see:

U. S. v. Brewer, 139 U. S. 278;
U. S. v. Noveck, 271 U. S. 201, 204;
U. S. v. Eqe; 49 Fed. 852, 853;
U. S. v. Potter, 56 Fed. 97;
21 A. & E. Encyc. Law, 366;
Bishop, Statutory Crimes (3d Edition 1901), ch. xxii, secs. 191-194; ch. xxiii, secs. 199-B, 220.

That the decision under consideration is not in conflict with those in either the Morse, Richardson, Lewis or Hargreave cases, cited by the Government, may be quickly demonstrated.

In the instant case, by the undisputed facts as expressed by the Government itself in its bill of particulars (tr. 19-20) the *act* committed by defendant, (a paying and receiving teller in separate department from, and in no way having authority over, the bookkeeping department) "which caused the false entry—*was the withholding* by him and the *failure* by him *to turn over* to the bookkeeping department, in the usual course of the bank's business, a deposit slip". That is the Government's case, expressed in its own language, in its bill of particulars, as to each the third and fourth counts under consideration. All else that need be understood is that, having received the two deposits in question, and having placed the proceeds into the bank's

funds where they belonged, he placed the deposit slips themselves in a cigar box on his desk, instead of in the drawer with other deposits where the bookkeeper would send and find them in the course of the day's business; and in consequence these deposits were not entered on the individual ledger in that day's business. As the Government itself plainly expressed his act, it was but the *negative* one of "withholding and failing to turn over" the deposits slips. The entry itself was made by a bookkeeper, in his absence, without his knowledge or direction, and over whom he had on authority.

In the Morse case, accused was executive officer and active head of the bank, the bookkeeper and his secretary directly under his control. In furtherance of his own scheme as head of the bank, to defraud and conceal, and by his own direction, he had his secretary execute a bogus or sham note, and had the bookkeeper enter the transaction as a loan, when in fact the transaction was a speculative purchase by the bank of stocks, in violation of law. He planned and directed the whole transaction, and it was by his express procurement and direction that the false entries were made, by means of his secretary taking the false documents to his bookkeeper, who entered the transaction on the books. All elements, including his planning, devising and executing the scheme, and directing through his secretary, the entries, were submitted to the jury and found against him, on what the court held was ample positive and circumstantial evidence to sustain the finding. The Appellate Court said that such an entry when not made by the accused himself, must have been made by *his direction and* procurement, but that it was "immaterial" whether he, in making the entry

> "acts through pen or a *clerk controlled by him*—it seems to us that defendant is as fully responsible for any false entries which necessarily resulted from the presentation of these pieces of paper which he caused to be prepared (with the purpose of having them entered). as if he had given oral instructions—or had written them himself—there is no doubt here that defendant himself caused" his secretary to

leave the papers with the bookkeeper, from which the latter made the entries; and it was held the evidence showed Morse knew and directed that the entries should be made. There, needless to say, we have the case of his affirmative act, his control of the employees, and his direction that the entries be made,—a plain case of *facit per alium.*

The only parallel found is in the single fact the bookkeeper, or record clerk, apparently acted innocently without knowledge of the falsity of the entries. This is true in a number of recorded cases, and it is not contended of course, that guilty knowledge by the actual entrant is essential. The court manifestly had no intention to go beyond the decisions which rest the reason for the holding of responsibility on part of the directing officer on either the statutory rule of principles, or else on that "fundamental principle of agency" expressed in the maxim *qui facit per alium facit per se*,—as for instance, the cases of Kittenbach vs. U. S. 202 Fed. 377 and U. S. vs. Fish 24 Fed. 585, which rest the decision directly on the doctrine of principles, and of Scott vs. U. S. 130 Fed. 429, which bases it as well on the doctrine of *facit per alia*. Giles not having made the entry, what possible doctrine, known to the law, could make him guilty of its making, except he be a principal or except he be liable under the rule *qui facit per alium?* Yet surely no one would contend, under these facts, Giles was

a principal with whatever clerk or clerks, in routine duty, made the entries, in his absence, unknown to him, pursuant to no conspiracy with him, entirely beyond the scope of Giles' duty, and without his direction, contact or procurement; nor that the doctrine of *qui facit per alium*, the rule of agency, applies. If such absurdity were so, the porter above referred to, who stole the dollar from the cash, would thereby be a "principal" with the bookkeeper who later independently entered the cash on his record as one dollar more than in fact the bank had, or else would have become the *superior* of the bookkeeper and made the latter his "agent" to make the false entry; and in either event we would have the purloining porter guilty of the false entry.

The Government's contention here assumes, erroneously, too, that the *withholding of the information* was the *making of the entry* (which latter alone the statute punishes), whereas the negative act of withholding, and not reporting, had no direct relation to, and may not be said to have been, the making of the entry, but related and conduced *only* to the *falsity* of the entry made independently by another. The bookkeeper would no doubt have made his entry whether Giles reported or not. He would have made his entry, as he did, if the deposits in question had not been made, or if Giles had lost the slips, or forgotten the fact of the deposits, or if for any other conecivable reason the slips had failed to reach the particular bookkeeper who worked on those sheets of the ledger within the alphabetical range of which the first letters of the depositors' names fell. The *entry*, therefore, was *made* independently of Giles, or of any act of his, and without relation to the fact that his omission had conduced to its falsity. In short, Giles' act, undoubtedly, in the sequence of events, conduced to the

falsity of the entry, and to that only. But the offense lies in the *making* of an entry, and that only.

Plainly, and as well decided, the offense prescribed is the *making* of an *entry* which is *false, not* that an accused *made false an entry independently made by another.*

The Richardson case, like the Morse, was where one of the executive heads of the bank, the cashier, directed his clerk to make the false entries. The District Judge said

> "There is nothing in the contention that the defendant should have been charged as aiding and abetting, and not as a principal—the entries and items falsified were the work of others, but they were clerks, *acting under the direction* of the defendant—they may or may not have acted with knowledge so as to be guilty themselves, but the case does not turn upon that point. Where an act is done *by the procurement* of a person it is his act in effect.—'He is as guilty if he *directed* false *entries to be made* by the clerk or bookkeeper as if he made the entries in person' ".

Nothing in that decision contravenes the one here. It is a plain case of *"facit per alium."*

All that was involved in the Lewis case which is pertinent here was

> "that the reports to the Comptroller of the Currency were not made by the defendants",

(President and Vice President of the Bank,) with

> "practically complete control of its affairs".

Mr. Justice Van Valkenburgh, for the 8th Circuit, said the evidence showed the reports

> "were sent and caused to be sent by the defendants, and with their knowledge, whether by explicit direction in each case is immaterial. Morse v. United States (C. C. A. 2) 174 F. 539, 20 Ann. Cas. 938. As to the responsibility of *officers having control and management*, see opinion of this court in Cooper v. United States (C. C. A.) 9F (2nd) 216-222.

The Cooper case, referred to in the decision just considered, was one charging the Coopers with defrauding the Government in income and excess profit returns. It was claimed knowledge on part of the defendants was not shown. Judge Van Valkenburgh there said:

> "They were in sole and entire charge of the business: upon them was enjoined the duty of making those returns under oath—he must be held to know that which it is his duty to know, and which he solemnly promulgates. We do not by this recognize imputed or presumed knowledge or intent. We merely hold that the situation present is one from which the jury was entitled to infer knowledge on the part of the defendants".

The last decision claimed to be in conflict is the Hargreaves, 75 Feb. (2) 68. Nothing in that case touches the point. Hargreaves, executive head of the bank, was convicted of misapplication and false entries by means of sham notes whereby he was surreptitiously getting money from the bank for his own use. The court said concerning the false entries in the reports, they were based on notes made by third parties, the proceeds of which were diverted to Hargreaves, and the testimony showed the notes were signed

by dummies, the makers having no expectation of paying, and receiving no consideration, with no intention of assuming liability, and they were accepted by Hargreaves with that understanding; then quoted with approval from the parallel Morse case, the following:

> "The jury were warranted in finding that these were merely sham notes, that the makers gave them with no intention of assuming responsibility, and that the bank accepted them with the same understanding.
>
> "The entries in question found their way to the books and reports because the defendant set the machinery in motion which required the entries to be made. He knew every detail of the various transactions. They were all devised, accepted or engineered by him, and the jury were justified in find that the entries were false, and that they were made with intent to deceive."

The foregoing exhausts the decisions claimed to conflict with that in the case at bar. Comment to demonstrate the contrary is unnecessary. In each case the accused was an executive head, and in charge of the concern for which he acted in making the false entries, and in each case they were made by his subordinates under his control and direction, with his knowledge and approval, and by his direct procurement. All that is held in any of such decisions wherein they may be said to go beyond the plain and express words of the statute itself is, in line with many cases, that where one in authority knowingly, and with requisite intent, procures the entry to be made by another under his direction, he is guilty as if the entry were "made with his own pen". This, we conceive, is not extending the statute by construction, but rather is by virtue either of the law of principals, or else on the sound principle that one who

"acts through another acts himself". On no other sound foundation could these decisions stand. But we think on those they are grounded on impregnable principle. In the very nature of the principles governing the construction of criminal statutes, to go beyond the one or the other of these well known and oft applied doctrines would be unwarranted and unsound, as being an extension of plain words by construction. He cannot be guilty of "making" an entry who neither makes it, nor is a principal with another in its making, nor who does not by some affirmative act procure another to make it. The distinguished and venerable Judge Evans, who wrote the decisions in the two McClarty cases, was right. He but wrote the plain dictation of this court, as found in the great decisions from which he quoted, in accord with all authority announcing the essential principles governing construction of criminal statutes. Those two decisions, had he, in his long service on the bench, written no other, would have stamped him a great and just judge. Though the prosecutor may, and, as experience teaches us, will, in his impatience at the restraints of rule, inveigh, we respectfully submit, those great decisions, like those on authority of which they were written, and like the truly great majority opinion in the instant case, ought to stand, as judicial bulwarks, not only to safeguard the citizen who is entitled to have our penal laws so clearly expressed as to convey their plain meaning, not to have them left to be made a catch-all by doubtful implication, but, for the probable greater reason, that those charged with enforcement of such laws may not exceed just bounds and thus themselves oppress, where they are but expected to protect, society.

What has been said will sufficiently expose the un-

soundness of the extreme minority view,—extreme not only in its non-parallel illustrations, but in its interpretation of the relative duties and relations of accused and the bookkeeper, and of the acts of Giles beyond even what is asserted by the prosecution: typical, too, of that harsh attitude which would presume all against one shown to have committed error, even of judgment, and supply by implication and "construction", whatever is lacking in the law to enforce punishment.

Respondent, Giles, did not make any false entry. The only entry he made—that in the customer's pass-book—was correct. He directed no one else to make an entry. He made no memorandum from which anyone else made, or might make, an entry. He just omitted to place the two deposit slips in the drawer whence they might be later, in the day's business, found by those charged with the duty of conveying them to the bookkeeping department, and thence their amounts entered by bookkeepers in the customer's accounts. Instead, he placed them on top his desk, in a cigar box where he kept odds and ends, intending to *later* place them in the drawer whence they would go to the bookkeepers. It is not shown he even knew, or had reason to know, the bookkeepers would be called on to make any entry or change in the customers' accounts, until the deposits should be reported. He placed the cash, which the deposits represented, in the bank's cash, where it belonged. His cash was short by the sum of those deposits,—not, however by any fault or wrong on his part. This fact is conclusively established by the undisputed evidence, and by the verdict of acquittal on the first two counts. He took no money. He did no other wrong, other than to "withhold", for the time being, the deposit slips,—this much,

as to the false entry counts, by the government's admission, in its bill of particulars. The sum total of his offense, says the Government (tr. 19,20) "was the withholding by him and the failure by him to turn over to the bookkeeping department, in the usual course of the bank's business, a deposit slip". He would not withhold the deposit slip permanently, but would later turn it in, where it would go on the records. His only reason for the temporary withholding was in the error of judgment that he feared to report a shortage in his cash which he did not cause, was not responsible for, but could not account for. He was not the superior of, and owed no duty to, the bookkeepers, his duty, of course, being to his employer. He had no direction or control over the bookkeepers, and attempted none. It is not true he said "silently", or otherwise, to the bookkeeper (as the minority opinion would say) "these deposit slips placed in the drawer are all", nor to make entries according to them. That is but the figment of an imagination which would disregard the evidence and leap beyond the law, by implication, which every rule of criminal construction forbids. It might be conceivable had he *altered* or *changed*, augmented or reduced, the amounts of the slips in his possession, and *so reported them*, semblance of justification would be afforded for the conclusion in the minority opinion. But he did not do that. He did not make any report. He did not give any direction, express or implied. He did nothing toward the making of an entry. His act was wholly negative. He merely "withheld the slip". He sent no "poisoned candy", by mail or otherwise, — he "withheld" sending anything. He did not "deny necessary food" to the prisoner to feed and sustain whom was his exclusive duty; for his duty was only to his employer, the bank itself, and he owed no "duty" to the bookkeeper as

such,—and the harsh and unwarranted conclusion that the latter was *his* "agent" cannot do duty to make him so. All agency law repels the implication. Moreover, as soon as the bank failed, and he realized he could not, by finding the lost cash, or locating the responsible party who took it, recover or recoup the loss, he himself reported it, when no one else knew it, and himself assumed full civil responsibility for the disappearance of the cash while in his charge, and paid the shortage for which he was not responsible, in full—$1000.00 with borrowed money, the remainder with the proceeds of sale of his home. These are the undisputed facts. If he had had before him, at the moment, our statute which says, and says only, that an employee "who makes any false entry in any book, report or statement" thereby is guilty of an offense, it certainly would not have occurred to his mind, even had he been a lawyer, instead of a layman, that his act in withholding the deposit slips could by possibility be construed or tortured into the offense of making false entries. Except, therefore, all responsible authority be wrong when it says the natural meaning of the plain words of a statute may not be extended by construction to create an offense not clearly expressed, but that "before a man can be punished his case must be plainly and unmistakably within the statute", the case here presented is not so, and no reason exists why the petition sought should be granted.

Respondent respectfully prays that the petition for writ of certiorari be denied.

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